Supreme Court, U. S.
FILED
NOV 12 1975
MICHAEL RODAK, JR., CLERK

No. 75-407

In the Supreme Court of the United States

OCTOBER TERM, 1975

JOHN L. BEATTIE, JR., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES

This case arises out of the issuance of an Internal Revenue summons as part of an investigation into the tax liability of petitioner for the years 1968 through 1972. The summons sought the production of an accountant's workpapers and correspondence file used in the preparation of the tax returns of petitioner and his wife for those years. Petitioner had obtained the workpapers and correspondence file from his accountant prior to the service of the summons. Relying upon the Fifth Amendment privilege against self-incrimination, petitioner refused to comply with the summons. Thereafter, in this summons enforcement

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proceeding, the district court ordered the summons enforced (Pet. App. A). The court of appeals affirmed, but excluded from enforcement that portion of the summons requiring production of all correspondence between petitioner and his accountant[1] (Pet. App. B).

Petitioner contends: (1) that compulsory production of the workpapers is barred by his personal privilege against self-incrimination (Pet. 18–22); (2) that the court of appeals erred in declining to decide whether he must testify pursuant to the summons (Pet. 22–23); and (3) that he cannot be compelled to produce the workpapers in any event since the special agent, in accordance with Internal Revenue Service policy, advised him that he could not be compelled to incriminate himself by answering questions or producing documents (Pet. 23–24).

The question whether a taxpayer's personal privilege against self-incrimination can bar compulsory production of an accountant's workpapers in the possession of the taxpayer is awaiting decision in *United States* v. *Kasmir,* No. 74–611, and *Fisher* v. *United States,* No. 74–18, both argued on November 3, 1975. Although the taxpayers in those cases had transferred the workpapers to their attorneys after receiving them from their accountants, the basic issue in those cases is whether the transfer of an accountant's workpapers to the taxpayer creates a privilege against self-incrimination which did not theretofore exist.

[1] We are simultaneously filing a petition for a writ of certiorari from that aspect of the decision below.

Accordingly, the decisions in those cases will in all likelihood govern the result here.

For the foregoing reason, it is respectfully submitted that the petition for a writ of certiorari should be held pending this Court's decisions in *Kasmir* and *Fisher.*[2]

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

[2] The remaining issues raised by petitioner do not warrant further review. If, as we contend in *Kasmir* and *Fisher*, compulsory production of an accountant's workpapers does not violate the taxpayer's privilege against self-incrimination, then enforcement of the summons would not violate the announced policy of the Internal Revenue Service currently in force (see IRS News Release IR-949, 1968 CCH Stand. Fed. Tax Rep., § 6946 (Nov. 26, 1968)) requiring special agents to advise taxpayers upon first contact that, *inter alia*, they cannot be compelled to incriminate themselves by answering questions or producing documents. As the court of appeals correctly recognized (Pt. App. B 29a), the warning was intended to be coterminous with the privilege. Similarly, the failure of the court of appeals to pass upon that portion of the summons requiring petitioner's testimony does not require review. The issue is not ripe for review since petitioner must first appear before the agent and elect whether or not to assert the privilege with respect to each question asked. *In re Turner*, 309 F. 2d 69, 71 (C.A. 2). No questions have yet been asked of petitioner.

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